

OCT 10 2000

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)

Amendment of Section 73.622(b),)
 Table of Allotments,)
 Digital Television Broadcast Stations)
 (Little Rock, Arkansas))

MM Docket No. 00-139 /
 RM-9915

To: Chief, Video Services Division

COMMENTS OF KM TELEVISION OF EL DORADO, L.L.C.

1. KM Television of El Dorado, L.L.C. ("KM"), applicant for a new commercial television station on analog Channel 43 at El Dorado, Arkansas,¹ by its counsel, and pursuant to Sections 1.415 and 1.420 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.420, respectfully submits these Comments in support of the proposed amendment of Section 73.622(b) of the Commission's rules, 47 C.F.R. § 73.622(b), the Digital Television ("DTV") Table of Allotments, to substitute DTV Channel 44 for the DTV Channel 43 currently allotted to Little Rock, Arkansas, as proposed by the Petition for Rule Making² and the Notice of Proposed Rule Making in the above-

¹ The original applicant, KM Communications, Inc., filed an amendment to its pending application on April 19, 2000 proposing the substitution of KM Television of El Dorado, L.L.C. as the applicant, among other changes; both entities have the same 100% owner, sole director and officers. See File No. BPCT-19960930KV (the application, as amended, the "KM Application").

² See Petition for Rule Making to Amend the DTV Table of Allotments (the "Petition") filed October 27, 1999 by Channel 42 of Little Rock, Inc. ("Channel 42"); see also Amendment to Petition to Amend the DTV Table of Allotments filed May 5, 2000 by Channel 42, and Change in Licensee for Rulemaking Proceedings filed September 8, 2000 by River City Broadcasting, Inc. ("River City"). Channel 42 is the former and River City is the current licensee of television station KYPX(TV), Little Rock, Arkansas (for ease of reference both Channel 42 and

captioned proceeding.³ In support of these Comments and the proposed DTV channel substitution for Little Rock, KM submits the following:

I. CHRONOLOGICAL BACKGROUND

2. On June 28, 1996, the first applicant filed an application for a construction permit for a new television station on the vacant analog (i.e., National Television Systems Committee, or "NTSC") Channel 43 allotment for El Dorado, Arkansas.⁴ The Agape Application and one competing application⁵ were placed on a Commission "A" cut-off list Public Notice, inviting interested parties to file competing applications on or before October 1, 1996.⁶ KM filed the KM Application in response to this Public Notice, as did three other applicants.⁷ Significantly, none of the El Dorado Applications required nor requested a waiver of the Commission's "freeze" imposed in its "advanced television" (or "ATV") proceeding (a precursor to the DTV proceeding) on the filing

River City shall be referred to herein as "KYPX").

³ See Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Little Rock, Arkansas), MM Docket No. 00-139, RM-9915, Notice of Proposed Rule Making, DA 00-1798 (Video Services Division, released August 18, 2000)(the "NPRM").

⁴ See Application of Agape Church, Inc. ("Agape"), File No. BPCT-19960628KF (the "Agape Application").

⁵ See Application of KB Communications Corporation ("KB"), File No. BPCT-19960710KW (the "KB Application").

⁶ See Public Notice, Report No. A-196 at 2 (released August 16, 1996).

⁷ See Applications of Sioux Falls 64, L.L.C. ("Sioux Falls"), File No. BPCT-19960930KR (the "Sioux Falls Application"); United Television, Inc. ("United"), File No. BPCT-19961001LE (the "United Application"); and Cardinal Broadcasting Corporation ("Cardinal"), File No. BPCT-19961001XN (the "Cardinal Application")(and collectively with the KM Application, the Agape Application and the KB Application, the "El Dorado Applications").

of applications within certain specified distances of certain specified top television markets (i.e., the "ATV Freeze").⁸

3. On April 3, 1997, the Commission adopted its Sixth Report and Order⁹ in the DTV proceeding, specifically stating that it had protected vacant analog allotments that were the subject of pending applications, such as the El Dorado Channel 43 allotment. See DTV Sixth R&O at ¶ 112. The Commission clarified this policy further on reconsideration in December 1998, clarifying that only vacant analog allotments with pending applications that were "outside of the [ATV] freeze areas" -- such as the El Dorado Applications -- were protected from conflicting DTV allotments.¹⁰ The Commission allotted DTV Channel 43 to Little Rock as the paired channel for the KYPX(TV) analog Channel 42 allotment, first with 133.7 kilowatts effective radiated power ("ERP") and an antenna height above average terrain ("HAAT") of 156 meters, see DTV Sixth R&O, Appendix B at B-8, and later with the ERP increased to 139.7 kilowatts at the same 156 meters antenna HAAT.¹¹

⁸ See Advanced Television Systems, Mimeo No. 4074, 52 Fed. Reg. 28346 (1987).

⁹ See Advanced Television Systems and Their Impact Upon the Existing Television Service, MM Docket No. 87-268, Sixth Report and Order, FCC 97-115, 12 FCC Rcd 14588, 7 CR 994 (1997)(the "DTV Sixth R&O").

¹⁰ See Advanced Television Systems and Their Impact Upon the Existing Television Service, MM Docket No. 87-268, Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders, FCC 98-315, 14 FCC Rcd 1348, 14 CR 522 at ¶ 38 (1998)(the "DTV Second MO&O on Reconsideration").

¹¹ See Advanced Television Systems and Their Impact Upon the Existing Television Service, MM Docket No. 87-268, Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order, FCC 98-24, 13 FCC Rcd 7418, 11 CR 634, Appendix B at B-3 (1998)(the "DTV First MO&O on Reconsideration").

4. KYPX filed the Petition in October 1999, specifically acknowledging that its DTV Channel 43 allotment was severely limited by the need to protect the Channel 43 El Dorado allotment and pending applications for same.¹²

5. KM ultimately was the high bidder at a Commission auction in March 2000 for the El Dorado Channel 43 permit, with a high bid of \$316,000 for the construction permit, see Public Notice, DA 00-690 (released March 27, 2000), in reliance on the Commission's statements in the DTV proceeding that pending applications for new analog stations were protected from conflicting DTV allotments. KM filed an amendment to its pending application on April 19, 2000, in response to that Commission Public Notice, which included an amendment to its engineering proposal to specify the same transmitter site, ERP and antenna height¹³ as the Sioux Falls Application, which at that time was still pending and entitled to protection from conflicting DTV allotments.

6. KYPX filed an application for a construction permit to construct DTV Channel 44 facilities on May 1, 2000, and filed a copy of its DTV application as an amendment to the Petition shortly thereafter. KM understand that KYPX's DTV Channel 44 application fully protects its El Dorado Channel 43 application, and therefore KM supports a grant of KYPX's application for DTV Channel 44.

7. The KM Application (as amended) was accepted for filing on May 23, 2000, see Public Notice, DA 00-1130 (released May 23, 2000); announced as ready for grant on June 15, 2000,

¹² See Petition at 2 and Technical Exhibit at 2-3. Of note, KYPX referred to the United Application (File No. BPCT-961001LE) as the limiting application, when in fact the Sioux Falls Application also is more limiting to KYPX in certain directions. Id., Technical Exhibit at n.2.

¹³ Although KM specified the same antenna height above ground level, KM calculated the resulting antenna HAAT as 530 meters, which is 5 meters higher than the 525 meters antenna HAAT calculated by the applicant in the Sioux Falls Application.

see Public Notice, DA 00-1308 (released June 15, 2000); and KM paid the balance of its \$316,000 winning high bid on or before the June 29, 2000 Commission deadline for such final payment of the balance of the full amount of KM's winning high bid. Nevertheless, the KM Application remains pending. In response to a status inquiry in August 2000, the FCC staff indicated informally that final processing and grant of the KM Application was being delayed due to concerns for a potential conflict with the KYPX DTV Channel 43 allotment to Little Rock, but also that KYPX's proposed change of its DTV allotment to DTV Channel 44 would resolve any potential concerns, permitting a grant of the KM Application.

II. GRANT OF THE PETITION WOULD SERVE THE PUBLIC INTEREST

8. Although KM was disappointed that its application for Channel 43 at El Dorado has been delayed by the Little Rock DTV Channel 43 allotment, KM looks forward to a prompt and timely resolution of this matter. As set forth more fully herein, a grant of the proposed substitution of DTV Channel 44 for DTV Channel 43 at Little Rock would best serve the public interest as a preferential arrangement of allotments. A grant of the Petition would also serve the public interest by conforming the DTV Table of Allotments to the Commission's stated policy of not making DTV allotments that conflict with vacant analog allotments for which applications were pending that did not require a waiver of the ATV Freeze, thereby remedying a DTV Channel 43 allotment to Little Rock that appears to have been made in conflict with that stated policy.

9. A grant of the Petition would also permit the prompt grant of the KM Application, allowing a new over-the-air broadcast service to be initiated serving El Dorado, Arkansas and the surrounding service area of the new station. KM notes that as the high bidder in the recent auction, the Commission presumes that KM would best initiate the new analog television service to El

Dorado, since KM placed the highest value on the auctioned spectrum, and therefore the proposed substitution would support the Commission's broadcast auction policies (not to mention fundamental fairness, since KM has already paid the full amount of its winning high bid in the auction). Furthermore, a prompt grant of the Petition and the KM Application would serve in an immediate and concrete manner the Commission's often stated -- but also often elusive -- goal of promoting female and minority ownership in broadcasting, since KM is a 100% female- and minority-owned company.

III. THE KM APPLICATION WAS ENTITLED TO INTERFERENCE PROTECTION FROM CONFLICTING DTV ALLOTMENTS

9. The Commission has specifically recognized, once again as recently as March 8, 2000 (i.e., prior to the Commission's auction of the El Dorado Channel 43 permit), that "[t]hose pending applications for new NTSC stations that were not subject to the [ATV] application freeze were protected by the initial DTV table of allotments".¹⁴ This Commission statement simply reconfirms the Commission's policy that was first adopted when the initial DTV table of allotments was adopted in April 1997, and which has been expressly confirmed by the Commission through its final reconsideration in the DTV proceeding. See DTV Sixth R&O at ¶ 112; see also DTV Second MO&O on Reconsideration at ¶ 38. The Commission's most recent statement also makes clear that **all** pending applications for a vacant analog allotment were entitled to protection, and not just some of the applications filed for a given vacant allotment.¹⁵

¹⁴ **See Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MM Docket No. 00-39, Notice of Proposed Rule Making, FCC 00-83 at ¶ 49 (released March 8, 2000).**

¹⁵ The Commission staff has suggested informally that the actual DTV allotment process may not have followed the Commission's stated policy of protecting all applications for a vacant

10. The U.S. Court of Appeals for the D.C. Circuit has also expressly recognized and affirmed this specific policy, stating in July that when making DTV allotments, “[t]he FCC reasonably interpreted its commitment in the [DTV Sixth R&O] to maintain and protect vacant NTSC allotments for which applications were pending”, albeit “limited to applications for vacant allotments not subject to the [ATV] Freeze Order or for which a waiver of the [ATV] Freeze Order had been granted.”¹⁶

11. Quite simply, the Commission may not ignore its policy decision, adopted after notice and comment in a rule making of general applicability, that long-pending applications for construction permits for new analog television stations which do not require a waiver of the ATV freeze and which were filed prior to the September 20, 1996 deadline for filing such applications (or that were timely-filed in response to an “A” cut-off list Public Notice of such applications filed prior to that deadline), were and are entitled to protection from conflicting DTV allotments. The KM Application as originally filed, and the Sioux Falls Application which specified the same parameters that KM proposed in its April 19, 2000 amendment of the KM Application, meet these criteria and therefore were and are entitled to protection from conflicting DTV allotments. KM submits that the best means of providing the KM Application the protection to which it is entitled from the conflicting KYPX

allotment, but rather that the DTV allotment process may have protected only a “lead” application, such as the first application filed for a given vacant allotment. The instant case is a good example illustrating the allotment problems that could be caused if the DTV allotment process did in fact protect only the first-filed application for an analog allotment - - the Agape Application, the first application filed for El Dorado, specified the weakest field strength toward Little Rock from among all of the 6 applications filed for the allotment. Nothing in the Commission’s notices of proposed rule making or decisions in the DTV proceeding would have informed interested parties of a Commission approach of protecting only one selected application, rather than all pending applications, for vacant analog allotments.

¹⁶ See Community Television, Inc. v. Federal Communications Commission, Docket No. 98-1106 (D.C. Cir., decided July 7, 2000). A copy of the decision is available at the following Internet address: <http://pacer.cadc.uscourts.gov/common/opinions/200007/98-1106a.txt>

DTV Channel 43 allotment is a grant of the instant Petition and the proposed substitution of DTV Channel 44 for DTV Channel 43 at Little Rock, Arkansas. Even KYPX itself, and its consulting engineers, expressly recognized this requirement to protect the pending El Dorado Applications, when the Petition was filed.

12. KM notes that when the Commission created the DTV Table of Allotments, some short-spacing was required between some initial DTV allotments, on the one hand, and the analog stations and pending applications and other DTV allotments that were entitled to protection, in the other hand. See DTV Sixth R&O at ¶ 217. However, the meaning of "protected" as defined by the Commission in its DTV Processing Guidelines¹⁷ established that any interference caused or received by protected analog or DTV stations, allotments or applications (even if short-spaced) as the "baseline" from which any new interference due to facility changes are to be calculated. The facilities in the KM Application (as amended April 19, 2000) are entitled to be included in the "baseline" since such parameters were entitled to protection when the DTV Table of Allotments was created (based on the Sioux Falls Application parameters). As discussed further below, the FCC staff has very recently indicated that it agrees that the KM Application/Sioux Falls Application parameters should be included in the baseline for the analysis of any El Dorado Channel 43 allotment application proposals, and therefore KM anticipates that the KM Application should now be granted shortly, as fully compliant with the Commission's DTV Processing Guidelines, including with regard to the KYPX DTV Channel 43 allotment.

IV. THE KM APPLICATION PROVIDES THE NECESSARY PROTECTION TO KYPX'S DTV CHANNEL 43 ALLOTMENT

¹⁷ See Public Notice, Additional Application Processing Guidelines for Digital Television (DTV) at 8 and 11 (released August 10, 1998)(the "DTV Processing Guidelines").

13. Even assuming that the Commission does not include the KM Application/Sioux Falls Application in the baseline for calculating the effect of the proposal on DTV stations, authorizations and allotments, as the Commission staff has agreed it should do, KM submits that the KM Application (as amended on April 19, 2000 to use the Sioux Falls Application parameters) fully provides the necessary protection required to KYPX's current DTV Channel 43 allotment. See KM Application, Engineering Report at 3 and Tables 1 and 3. Table 1 of KM's Engineering Report demonstrates that only 0.2% interference is predicted to the KYPX DTV Channel 43 allotment, which is permitted even under the Commission's guidelines for evaluating analog television minor modification applications.¹⁸ Specifically, the Commission has stated that "for NTSC minor change applications, which may not cause interference to DTV allotments or authorizations, we will round the determination of interference to the nearest percent."¹⁹ In the instant case, 0.2% would round down to 0% new interference from KM's proposed Channel 43 El Dorado facility to the KYPX DTV Channel 43 allotment.

V. CONCLUSION

14. KM recognizes the complexity of the Commission's DTV allotment and DTV transition process, and therefore KM intends to remain flexible and willing to negotiate a mutually agreeable solution to this matter, if necessary and within reason. KM also notes that its primary objective is the prompt grant of the KM Application and issuance of a construction permit for a new

¹⁸ KM notes that this stricter limitation on analog television minor modification applications should not apply to pending applications for new analog stations that do not require waiver of the ATV freeze, which instead were entitled to protection from initial DTV allotments, rather than required to protect such DTV allotments.

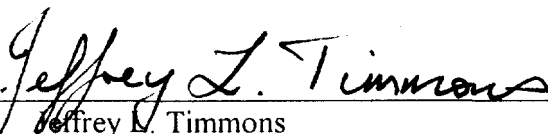
¹⁹ See DTV Processing Guidelines at 8 and 11.

analog television station on Channel 43 at El Dorado, Arkansas, so that KM may initiate a new television service serving that community and surrounding areas, and the grant of the proposed DTV channel substitution should not be necessary for such a grant. Accordingly, KM will make its representatives available to meet with the Commission staff and other interested parties on this matter, upon the Commission's request.

15. WHEREFORE, in light of the showings set forth herein, KM respectfully requests that the Commission grant KYPX's Petition for Rule Making and the substitution of DTV Channel 44 for the current DTV Channel 43 allotment at Little Rock, Arkansas, and/or promptly process and grant the KM Application, for a construction permit for a new analog television station on Channel 43 at El Dorado, Arkansas, with the protection from DTV station interference to which such station should be entitled under the Commission's established DTV rules and policies.

Respectfully submitted,

KM Television of El Dorado, L.L.C.

By: 
Jeffrey L. Timmons
Its Attorney

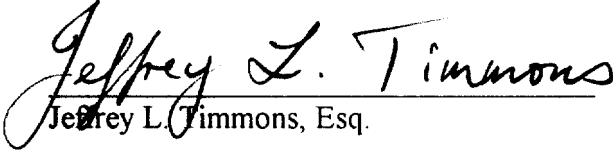
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CERTIFICATE OF SERVICE

I, Jeffrey L. Timmons, hereby certify that on this 10th day of October, 2000, copies of the foregoing "Comments of KM Television of El Dorado, L.L.C." have been served by United States Postal Service priority mail, postage prepaid, upon the following:

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